

## **FINAL STATEMENT OF REASONS:**

The California Department of Corrections and Rehabilitation (CDCR) proposes to amend Sections 3000, 3045.3, 3123, 3134, 3250.4, 3269.1, 3274, 3383 and 3482 of the California Code of Regulations (CCR), Title 15, concerning Lockdown and Modified Program definitions.

CDCR determined the need to clarify the existing term “Lockdown” and introduce a newly defined term, “Modified Program.”

The term Lockdown is amended to establish that all inmates are restricted to their cell/dormitories encompassing no less than a facility. To provide a distinction, the “Modified Program” definition is adopted to accurately reflect any administrative action that may result in a partial release, temporary suspension, or limitation of various programs/services of the inmate population within the impacted facility. The Department has used modifications to lockdowns as a step toward normal operation for several years. This regulatory action establishes a definition of modified programs in our regulations.

The Department believes that an accurate definition of these two terms in the CCR is essential. Incidents/disturbances within the institutions cause lockdowns and modified programming for the sake of the safety and security of the institution, staff and inmates. Lockdowns can occur for many reasons: 1) natural disasters, such as floods and earthquakes; 2) power outages; 3) and escapes. Lockdowns may also be necessary when riots and fights among inmates occur. Existing regulations in section 3383 of Title 15 describe how such states of emergency are to be handled by institution heads.

In Norwood v. Vance the court said the following: “[Prison] officials have a duty to keep inmates safe and in particular to protect them from each other” and “prison officials have a right and a duty to take the necessary steps to re-establish order in a prison when such order is lost. This is for the benefit of the prisoners as much as for the benefit of the prison officials.”

It is never the Department’s policy to base lockdowns or modified programming solely on the inmate’s race/ethnicity. However inmates often organize themselves and recruit street and prison gang members from within their own race and further sub-divide themselves by geographical area. It is not uncommon for uninvolved factions or ethnic groups to continue to experience a delay in programs or services during a modified program period as data gathering, interviews and investigations are conducted to establish those individuals that were involved in an incident and those that were not. It is the objective of the Department to return all affected inmates to normal programming as soon as safety and security considerations will allow.

After the close of the initial minimum 45 day public comment period, a written comment was received citing that the proposed language in CCR Section 3000, Definitions, listing examples of allowances for inmate movement during a modified program, excluded the term “mental health”. The commenter was concerned that solely using the term, “medical” could be misinterpreted to exclude mental health appointments during institutional modified programs. The department agreed with the commenter and made accommodations. Additionally in CCR Section 3269.1, Integrated Housing, it was originally thought that the “modified program” term alone would suffice for the intended purpose of the section. Upon further review it was

determined that the text “lockdown” should remain to allow wardens or designees to determine which program change is best suited when there arises a need to temporarily suspend the Integrated Housing program. **A 15-day re-notice was made available to the public with an effective comment period of February 28, 2011- March 17, 2011. The 15-day re-notice was posted on the California Department of Corrections (CDCR) website for review.**

In response to a comment received during the initial Notice of Change in Regulations, CDCR Office of Legal Affairs recommended that CDCR make an additional language change within the proposed definition of “modified program”. A final decision was made by CDCR administration to amend the proposed text after the closing of in initial 15-day comment period. Therefore a 2<sup>nd</sup> 15-day re-notice was made available to the public with an effective comment period of April 6, 2011-April 22, 2011. **A 2<sup>nd</sup> 15-day re-notice was also posted on the California Department of Corrections (CDCR) website for review. No comments were made during the 2<sup>nd</sup> 15-day re-notice.**

The changes to the proposed regulations are as follows:

### **3000. Definitions.**

**Section 3000 is amended** to provide a revised and clarified definition for the term “Lockdown”. Section 3000 is further amended to alphabetically merge the adopted definition, “Modified Program”.

A 15-day re-notice was generated to announce an amendment to the text language originally proposed Notice of Change to Regulation. The term “mental health” was adopted body of text of the definition of “Modified Program” to accommodate a concern raised by a commenter. The commenter was concerned that solely using the term, “medical” could be misinterpreted to exclude mental health appointments during institutional modified programs. This was never the intent of the regulations. Therefore, “mental health” has been added for clarity.

A 2<sup>nd</sup> 15-day re-notice was generated to announce an amendment to the text language originally proposed Notice of Change to Regulation. A legal opinion provided to CDCR prompted an additional change to a portion of the language in the “Modified Program” definition. The text, “there is a legitimate penological interest in doing so” was amended to “it is necessary and narrowly tailored to further a compelling government interest.”

### **3045.3. “S” Time.**

**Subsections 3045.3(a) through 3045.3(b) remain unchanged.**

**Subsection (b)(1) is amended** to add the term “or modified program” after the term lockdown. With the addition of this term, inmates who are removed from their work/training assignment under an institutional modified program shall likewise continue to retain their work/training status as they would under an institutional lockdown. The addition of this term is consistent with already existing language in the CCR, specifically in subsection 3269.1(g), where the use of the terms lockdown and modified program are used in the same sentence.

**Subsections 3045.3(b)(2) through 3045.3(b)(22) remain unchanged.**

### **3123. Access to Law Libraries.**

**Subsections 3123(a) through 3123(c) remain unchanged.**

**Subsection 3123(c)(1) is amended** to add the term, “or Modified Program” after the term lockdown, with respect to potential delay in access to institutional law libraries. Unlike a Lockdown, where all institutional programs and services are suspended, a Modified Program can provide allowances for an inmate’s physical access to the Law Library. However, there can be instances where inmate movement may not be feasible due to logistics or security concerns. In this scenario the law library staff must facilitate the “paging process” in that requested legal material is delivered to an inmate’s respective cell or dormitory. The paging process shall ensure unfettered access to law library resources. The addition of this term is consistent with already existing language in the CCR, specifically in subsection 3269.1(g), where the use of the terms lockdown and modified program are used in the same sentence.

**Subsections 3123(c)(2) through 3123(c)(3) remain unchanged.**

**3123(d) is amended** to add the term, “or Modified Program” after the term lockdown, with respect to potential delay in access to institutional law libraries. Unlike a Lockdown, where all institutional programs and services are suspended, a Modified Program can provide allowances for an inmate’s physical access to the Law Library. However, there can be instances where inmate movement may not be feasible due to logistics or security concerns. In this scenario the law library staff must facilitate the “paging process” in where requested legal material is delivered to an inmate’s respective cell or dormitory. The paging process shall ensure unfettered access to law library resources. The addition of this term is consistent with already existing language in the CCR, specifically in subsection 3269.1(g), where the use of the terms lockdown and modified program are used in the same sentence.

**Subsections 3123(e) through 3123(f) remain unchanged.**

### **3134. General Mail Regulations**

**Subsections 3134(a) through 3134(c)(3) remain unchanged.**

**Subsection 3134(c)(4) is amended** to add the term “or modified program” after the term lockdown, with respect to the potential of delay in the processing of packages. The addition of this term is necessary in order to clarify that in cases when facilities or entire institutions are on a modified program, a potential delay in the processing of packages may occur due to staff redirections, inmate escorts or searches for contraband in the general interest of the safety and security of the institution. The addition of this term is consistent with already existing language in the CCR, specifically in subsection 3269.1(g), where the use of the terms lockdown and modified program are used in the same sentence.

**Subsections 3134(c)(5) through 3134(f) remain unchanged.**

#### **3250.4 Termination of an Inmate Publication.**

**Section 3250.4 is amended** to add the term, “modified program” after the term lockdown. The addition of term is necessary to supplement the existing regulation giving authorization to the director to terminate inmate publications under a lockdown or other declared emergency. The addition of this term is consistent with already existing language in the CCR, specifically in subsection 3269.1(g), where the use of the terms lockdown and modified program are used in the same sentence.

#### **3269.1 Integrated Housing.**

**Subsections 3269.1 through 3269.1(f) are unchanged.**

**Section 3269.1(g) is amended** to remove the term, “lockdown” and keep the existing term “modified program”. The removal of the term lockdown is necessary because the existing language in this section is appropriately used in the definition “modified program.”

A 15-day re-notice was generated correct text language originally proposed. It was originally thought that the “modified program” term alone would suffice for the intended purpose of the section. Upon further review it was determined that the text “lockdown” should remain to allow wardens or designees to determine which program change is best suited when there arises a need to temporarily suspend the Integrated Housing program. Additionally, in the same pre-existing text, the conjunction “and” within “lockdown and modified program” is changed to, “or” to distinguish both terms and remove any interpretation that lockdown and modified program are synonymous.

#### **3274. Inmate Count and Movement.**

**Subsections 3274(a) through 3274(b)(3)(C)3 are unchanged.**

**Subsection 3274(c) is amended** to add the term, “or modified program” after the term lockdown. This section addresses the Department’s responsibility in maintaining a system to account for all inmates and establish a schedule of routine movement for inmates under the Department’s jurisdiction. The addition of this term is consistent with already existing language in the CCR, specifically in subsection 3269.1(g), where the use of the terms lockdown and modified program are used in the same sentence.

**Subsection 3274(d) remains unchanged.**

#### **3383. State of Emergency.**

**Subsections 3383(a) through 3383(b) remain unchanged.**

**Subsections 3383(b)(1) and 3383(b)(2) are amended** to add the words “or modified program” after the word lockdown. This is needed to clarify that in an addition to a lockdown, approval is required by the Secretary or the Secretary’s designee when operations are suspended past 24 hours. The addition of this term is consistent with already existing

language in the CCR, specifically in subsection 3269.1(g), where the use of the terms lockdown and modified program are used in the same sentence.

**Subsections 3383(b)(3) through 3383(d) remain unchanged.**

#### **3482. Joint Venture Program Contracts.**

**Subsections 3482(a) through 3482(a)(13)(A) remain unchanged.**

**Subsection 3482(a)(13)(B) is amended** to add the term modified program after the term lockdown, with respect to the potential delay/restriction of inmate-employees of the Joint Venture Program. Joint Venture Programs are partnerships between a private employer and the Department where inmates manufacture goods or provide services in the facilities managed by the private employer but are located on the grounds of a CDCR institution. The term modified program is necessary in order to clarify that in cases when facilities or entire institutions are on a modified program a potential delay/restriction of inmate-employees reporting to their job assignment may occur due to staff redirections, inmate escorts or searches for contraband in the general interest of the safety and security of the institution. The addition of this term is consistent with already existing language in the CCR, specifically in subsection 3269.1(g), where the use of the terms lockdown and modified program are used in the same sentence.

**Subsections 3482(a)(13)(C) through 3482(d) remain unchanged.**

#### **DETERMINATION:**

The Department has determined that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective and less burdensome to affected persons.

#### **ASSESSMENTS, MANDATES AND FISCAL IMPACT:**

This action will neither create nor eliminate jobs in the State of California, nor result in the elimination of existing businesses, or create or expand businesses in the State of California.

The Department, in proposing amendments to these regulations, has not identified nor has it relied upon any technical, theoretical, or empirical study, report, or similar document.

The Department determines this action imposes no mandates on local agencies or school districts; no fiscal impact on State or local government, or Federal funding to the State, or private persons. It is also determined that this action does not affect small businesses nor have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states because they are not affected by the internal management of State prisons; or on housing costs; and no costs or reimbursements to any local agency or school district within the meaning of Government Code Section 17561. Additionally, there has been no testimony or other evidence provided that would alter the Department's initial determinations.

## **PUBLIC HEARING COMMENTS:**

### **Public Hearing: Held January 20, 2011**

There were no oral comments received during the public hearing.

## **SUMMARIES AND RESPONSES TO WRITTEN COMMENTS:**

### **Commenter #1:**

**Comment 1:** Commenter states that the term “mental health” should be inserted into California Code of Regulations Title 15, Section 3000, Definitions, Modified Program. The commenter states that the proposed text, “For those inmates whose movement has been restricted, movement may be authorized on a case-by-case basis for essential or emergency services such as medical, dental or law library visits.” The commenter states that in their system the term “medical” has been used to only mean physical medicine and not include mental health services.

**Accommodation:** Yes

**Response 1:** The Department agrees with commenter.

The Department agrees to modify the proposed regulatory action and incorporate the language “mental health” into section CCR Section 3000, Definitions, Modified Program, in order to make a distinction from the term, “medical”.

### **Commenter #2**

**Comment 2A:** Commenter states that the proposed regulatory action will essentially be a blank check for the Department of Corrections and Rehabilitation to do whatever they want to do. The commenter argues that unusual occurrences happen quite often at his institution and CDCR will abuse its power and use the inmate population as pawns to meet their own agenda. The commenter makes several examples of unusual occurrences at his respective institution.

**Accommodation:** None.<sup>8</sup>

**Response 2A:** Although the above comment/objection does regard some aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to Government Code Section 11346.9(a)(3), the comment/objection is too generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

### **Commenter #3**

**Comment 3A:** Commenter states that the proposed version of the modified program policy as it is written is very “open ended”, vague and is basically giving each prison a “blank check”. Commenter states that at his respective institution a modified program happens when the wind blows hard.

**Accommodation:** None.

**Response 3A:** The Department notes that the commenter offers no suggested language or changes that would make the regulation less open-ended and more precise.

**Commenter #4**

**Comment 4A:** Commenter states that no matter how the CDCR decides to define these terms they will both ultimately mean the same thing and will ultimately lead to ambiguity and hair splitting when it comes to lockdowns.

**Accommodation:** None.

**Response 4A:** The Department disagrees with the commenter. The Department's position is that the adoption of the definition Modified Program makes a clear distinction from the term Lockdown. The term Lockdown implies the complete suspension of all inmate movement and programs. A Modified Program is typically the intermediate step between a complete lockdown and normal prison operation that reflects any administrative action that may result in a partial release, temporary suspension or limitation of various programs or services. The department notes that the commenter has already concluded that the two terms mean the same thing no matter how the CDCR decides to define them.

**Comment 4B:** Commenter states that this CDCR regulation change is in response to the Prison Law Office (PLO) request to take steps to stop CDCR's ongoing policy and practice of locking down prisoners on the basis of their race. CDCR is attempting to disguise lockdowns as modified programs.

**Accommodation:** None.

**Response 4B:** The department disagrees with the commenter's assertion that this regulatory action is in response to the July 14, 2010 PLO request. CDCR initiated the development of this regulation in 2009.

**Commenter #5**

**Comment 5A:** Commenter states that the proposed definition of Lockdown and Modified Program should not be included in the same change to regulations to mean the same thing. A Modified Program is supposed to be the less restrictive measure. But including it with [the] definition for lockdown it can later be used to justify staff not giving quarterly packages, inmate canteen, visits, or access to work or school.

**Accommodation:** None.

**Response 5A:** The department disagrees with the commenter. The proposed regulation clearly makes a distinction between the terms Lockdown and Modified Program. The proposed definition of Modified Program includes language that authorizes the administration of the respective institutions to determine inmate movement on a case by case basis for essential emergency services such as medical, dental, mental health or law library visits. This temporary modification of inmate movement may also impact quarterly packages, inmate canteen, visits or access to work or school. Lockdowns do not allow for such movement.

## **Commenter #6**

**Comment 6A:** Commenter states that there have been numerous appeals that specifically address the institutions failure to ensure a policy directive is first promulgated and there has been a consistent lack of prerequisite process.

**Accommodation:** None

**Response 6A:** The department disagrees with the commenter's claim that there has been a "consistent lack of prerequisite process". Any proposed regulation by the department is thoroughly vetted by rules imposed in the Administrative Procedures Act (APA). Several avenues are necessary prior to implementation of a regulation which includes; publishing the proposed change in the California Regulatory Notice of Register; a minimum 45 day public comment period; and a public hearing.

**Comment 6B:** Commenter cites several court cases and states that a, "prisoner retains the right to be free of arbitrary and purposeless use of authority." The commenter gives an example of a modification of program and included a copy of a memorandum that includes the local institution/facility yard schedule.

**Accommodation:** None.

**Response 6B:** See Response 6A. Additionally, this proposed regulation change does not seek to reconcile any local administrative actions or decisions but only seeks to clarify and define existing language within the regulations.

## **Commenter #7**

**Comment 7A:** Commenter states that he is glad that CDCR is trying to clear up the two meanings however the commenter states that CDCR is also trying to pull a fast one. Commenter states that during a modified program status he is always told to go to work but is deprived packages and canteen even though he is not a part of the problem [that caused the initial lockdown] and is a slap in the face. Positive programming inmates should be allowed to enjoy the few privileges they get and the facility would also benefit.

**Accommodation:** None.

**Response 7A:** See Response 5A

**Comment 7B:** Commenter states that there will be no additional costs will be added to any local government/school etc. or to the prison based on the fact that the number of cleared workers are low and could be done in one day and fewer packages would be issued.

**Accommodation:** None

**Response 7B:** Although the above comment/objection does regard some aspect or aspects of the proposed regulatory action and must be summarized pursuant to the Government Code Section 11346.9(b)(3), the comment/objection is either insufficiently related to the specific action, or too generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation or accommodation to the comment.



**Comment 7C:** Commenter asks why CCR section 3134(c)(4) sets a timetable during modified program as to when packages will be passed out and would like to know if the institution will reimburse for any spoiled food within the packages.

**Response 7C:** The department's position is that the proposed adoption of the term Modified Program into CCR Section 3134 (c)(4) will not change the department's intent to deliver packages, "...as soon as possible but not later than 15 calendar days". However this timetable will still be subject to the established regulation that packages may be delayed for certain holidays, Lockdowns [and Modified Programs]. Your concerns regarding food spoilage goes beyond the scope and purpose of the proposed regulation change and should be addressed at your respective institution.

#### **Commenter #8**

**Comment 8:** Commenter states that the new definition Lockdown is not equitable and the Department should re-think the strike through. Commenter states that "critical workers should be on a case by case basis", "and you should be able to merge the definitions without removal of incentive[s]". Additionally commenter states that, "critical workers show service under lockdown or modified program." Commenter states he speaks for all critical workers.

**Accommodation:** None.

**Response 8:** The Department does not dispute the need of inmate workers that an institution may deem "critical" to fulfill basic prison operations. Nor will this proposed regulation negate their use. This regulation change will not impact or dictate any locally established administrative policies on what inmate assignments may or may not be utilized.

#### **Commenter #9 and #10**

Commenter's submitted identical comments under their own names.

**Comment 9A:** Commenter states that he opposes the arbitrary and unconstitutional enactment of this regulation. Commenter states that CDCR is attempting to justify the pairing of the terms lockdown and modified programs to justify additional long term implementation (sic) of specific prisons and prisoners even if they are not involved in any situation that calls for a lockdown. The commenter gives numerous examples of how the locally enacted modified program has impacted his institution.

**Accommodation:** None.

**Response 9A:** Any proposed regulation by the department is thoroughly vetted by rules imposed in the Administrative Procedures Act (APA). Several avenues are necessary prior to implementation of a regulation which includes; publishing the proposed change in the California Regulatory Notice of Register; a minimum 45 day public comment period; and a public hearing. If these regulations are certified for adoption by the appropriate state oversight agency, the presumption will be that they were correctly adopted and are not arbitrary or unconstitutional.

Additionally, this proposed regulation change does not seek to reconcile any local administrative actions or decisions but only seeks to clarify and define existing language within the regulations.

**Comment 9B:** Commenter states that the 6 months, since July 1, 2010, “modified program” at his institution, was premature and illegally implemented prior to the notice of change to regulation and was cited due to the California budget crisis.

**Accommodation:** None.

**Response 9B:** The department disagrees with the commenter. This proposed regulation change does not seek to reconcile any local administrative actions or decisions but only seeks to clarify and define existing language within the regulations. Additionally, the Department has already determined that this regulatory action imposes no [fiscal] mandates or impact on State or local government and there has been no testimony or other evidence provided that would alter the Department’s initial determinations.

**Comment 9C:** Commenter states that a modified program has affected prisoners’ access to the Law Library and has been denied materials for several months for cell study unless the prisoners’ have a “court order” in a criminal or civil action and a court deadline to file a motion or response in legal matters.

**Accommodation:** None.

**Response 9C:** This regulation does not seek to reconcile any local administrative actions or decisions but only seeks to clarify and define existing language within the regulations. Additionally, the proposed regulatory action in CCR Section 3000, specifically addresses the Department’s responsibility to provide essential or emergency services inclusive of Law Library access “on a case by case basis”, during a Modified Program. Regulations governing law library access and priorities can be found CCR Title 15, Section 3122, Inmate Law Library.

#### **Commenter #10**

**Comment #10:** Commenter submitted identical language as commenter #9.

**Accommodation:** None

**Response 10:** Refer to response 6B

#### **Commenter #11**

**Comment 11A:** Commenter states that at his respective institution it is not uncommon to receive quarterly or special packages beyond 15 calendar days as required in CCR section 3134(c)(4). Commenter argues that adding the term, modified program, would allow the further delay of delivery of packages due to staff redirection.

**Accommodation:** None.

**Response 11A:** See response 7C

**Comment 11B:** Commenter attached a copy of a monthly schedule illustrating how custody staff is being redirected throughout the month.

**Accommodation:** None

**Response 11B:** See response 6B

**Commenter #12**

**Comment 12A:** Commenter made four (4) “general statements”: 1) CDCR continually exacerbates the need for Lockdown/Modified program due to its releasing of information to the media that play it statewide and citing a stabbing “several years ago”; 2) that CDCR infiltrates many inmates who have never been imprisoned for long durations with serial or habitual criminals is a causing factor of prison misbehavior; 3) a statement regarding prison overcrowding; and 4) drug overdoses in death row.

**Accommodation:** None

**Response 12A:** Although the above comment/objection does regard some aspect or aspects of the subject proposed regulatory action and must be summarized pursuant to Government Code Section 11346.9(b)(3), the comment/objection is either insufficiently related to the specific action, or too generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

**Comment 12B:** Commenter objects to proposed text of CCR 3000 statement, “modified programming will last no longer than necessary...to investigate the triggering event, and shall not target a specific racial or ethnic group unless there is a legitimate penological interest for doing so.” Commenter states that a reliance on legitimate penological interest is a judicial test that doesn’t apply to racial discrimination.

**Accommodation:** Yes.

**Response 12B:** The department agrees with your assertion that the use of the term, “legitimate penological interest” may not adequately or appropriately reflect the legal standard in respect to modification of institution programs. Therefore in CCR 3000, Definitions, the proposed text, “unless there is a legitimate penological interest in doing so” will be amended to read, “unless it is necessary and narrowly tailored to further a compelling government interest”.

**Comment 12C:** Commenter asserts that a Modified Program in regards to the use of the Legal Library is contrary to the Toussaint v McCarthy court case and obstructs access to the court.

**Accommodation:** None

**Response 12C:** See response 5A

**Comment 12 D:** Commenter states that the proposed “modified program” to restrict changes is an oxymoron and it is ridiculous to make mainline prisoners who have done nothing wrong

have to wait for packages as long as a staff member is coming to work and getting paid. Commenter asserts that escorts can be made to the package room to avoid backlogs.

**Accommodation:** None

**Response 12D:** See response 7C

**Comment 12E:** Commenter objects to the use of a modified program to suspend integrated housing assignments because CDCR has already agreed that the prison system is overcrowded and if there wasn't double cells/double bunk situations there would be no need for integrated housing.

**Accommodation:** None

**Response 12E:** See response 7B